

2010 WL 5864392 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Maryland.

Montgomery County

State of Maryland,

v.

Roger Mandel GREENBERG, Defendant.

No. 112081.

May 10, 2010.

### State's Sentencing Memorandum

Respectfully submitted, John J. McCarthy, State's Attorney for Montgomery County, Maryland, Amanda Michalski, Jessica Hall, Assistant State's Attorney for Montgomery County, Maryland.

On March 1, 2010, at the conclusion of a five-day trial, a jury found the Defendant guilty of four counts in case 112081: **Financial Exploitation** of a Vulnerable Adult § 8-801, Fraudulent Misappropriation of Funds by a Fiduciary § 7-113, Theft Scheme Over \$500 § 7-104, and Neglect of a Vulnerable Adult in the Second Degree § 3-605. Additionally, on March 2, 2010, the Defendant pled guilty to Illegal Possession of a Regulated Firearm § 5-133 in case 113618. Both matters are before the Court for sentencing. The guidelines for this Defendant for all his crimes are eight to fifteen years, with a maximum allowable penalty under the law of forty years. The State of Maryland is requesting this Honorable Court to impose the full forty years of executed incarceration for the reasons that follow.

The guidelines for this defendant for **Financial Exploitation** of a Vulnerable Adult §8-801 are eight years to fifteen years, with a maximum penalty of fifteen years MD Code, Criminal Law, § 8-801(c)(1). The Court can and should impose a separate sentence for **Financial Exploitation** of a Vulnerable Adult § 8-801. MD Code, Criminal Law, § 8-801 (d) ("A sentence imposed under this section *may be separate from and consecutive to* or concurrent with a sentence for any crime based on the act or acts establishing the violation of this section) (emphasis added). The sentence for **Financial Exploitation** of a Vulnerable Adult should be considered separately because the Defendant's acts of intimidation, an element of **Financial Exploitation** of a Vulnerable Adult under § 8-801 (b)(2), are distinct from the acts required to prove the Defendant's other crimes. In addition, upon any eventual release, the Defendant should be mandated to pay restitution, because he "*shall restore the property taken or its value to the owner, or, if the owner is deceased, restore the property or its value to the owner's estate*" (emphasis added). MD Code, Criminal Law § 8-801 (c)(ii).

The guidelines for Fraudulent Misappropriation of Funds by a Fiduciary §7-113 and Theft. Scheme Over \$500 § 7-104 are eight years to fifteen years, with a maximum penalty under the law of fifteen years, because these crimes merge for the purposes of sentencing. See *State v. Burroughs*, 333 Md. 614, 624, (1994) (finding that the doctrine of merger by legislative intent applied to the crimes of embezzlement by a fiduciary and theft). At the time of the Defendant's offense, Theft Scheme Over \$500 § 7-104 carried a maximum penalty of fifteen years. See MD Code Ann., Criminal Law, § 7-104(g)(1) (prior to October 1, 2009) "A person convicted of theft of property or services with a value of \$500 or more is guilty of a felony and: (i) is subject to imprisonment not exceeding 15 years." Fraudulent Misappropriation of Funds by a Fiduciary §7-113 is "subject to imprisonment for not less than 1 year and not exceeding 5 years." MD Code, Criminal Law § 7-113(b). Due to the doctrine of merger, the Court should apply the guidelines for Theft Scheme Over \$500 § 7-104 of eight years to fifteen years.

The guidelines for this defendant for Neglect of a Vulnerable Adult in the Second Degree § 3-605 are three years to five years, given that the maximum penalty under the law must not exceed five years. MD Code Ann., Criminal Law, § 3-605. The sentence for Neglect of a Vulnerable Adult in the Second Degree § 3-605 does not merge and must be run consecutive to any sentence for

the Defendant's other crimes because the evidence of neglect was not required to prove any of the other crimes. *See* MD Code Ann., [Criminal Law, § 3-605\(d\)](#) (“A sentence imposed under this section *shall be in addition to any other sentence* imposed for a conviction arising from the same facts and circumstances *unless the evidence required to prove each crime is substantially identical*”) (emphasis added).

The guidelines for this defendant for Illegal Possession of a Regulated Firearm § 5-133 are five years because the crime has a mandatory five year sentence without the eligibility for parole. MD Code Ann., [Public Safety, § 5-133\(c\)\(1\)](#) (“imprisonment for not less than 5 years, no part of which may be suspended.... [and] may not be eligible for parole”). The Defendant's crime of Illegal Possession of a Regulated Firearm § 5-133 carries no nexus to his fraud or neglect and should be consecutive to any other sentence.

The State of Maryland offers the following memorandum to assist the Court in reaching the appropriate sentence in this case.

## **I. FACTUAL SUMMARY**

Between 2007 and 2008, the Defendant neglected and **exploited** Evelyn Zucker, swindling her out of over \$130,000.00. Between November 2007 through December 2008, the Defendant embarked upon a course of conduct designed to infiltrate Ms. Zucker's life, isolate her from her friends and family, and then **exploit** her **financially** to his benefit. The Defendant gained access to Ms. Zucker by initially pretending to be a “good” friend of her deceased son, Harry. He capitalized on her charitable and generous nature and pretended that he had nowhere to stay. Ms. Zucker was unaware that he maintained a separate residence on Seven Locks Road where police later discovered copies of Ms. Zucker's driver's license, bank statements, and color photocopies of her checks. Once the Defendant began to frequent Ms. Zucker's home, he kept her neighbors, friends, and family away by telling them she could not speak with them on the phone and by turning them away from her residence.

The police began to investigate the Defendant for fraud when he was arrested on October 28, 2008 in the District of Columbia after making death threats towards Montgomery County Police. A search incident to arrest yielded five checks written on Ms. Zucker's bank account for \$9,000 each, and \$8,000 in cash. One check was written out to Evelyn Zucker on her Wachovia Bank account dated October 10, 2008 in the amount of \$9,000 for payment of bills. The other four checks were written out to the Defendant, Roger Greenberg, listing that they were to pay bills. The dates on two of those checks were October 11, 2008 and October 19, 2008. The other two checks left the date line blank. Therefore, \$27,000 worth of bills was listed as being paid for the month of October. Based on the suspicious nature of these checks, Montgomery County Police responded to Ms. Zucker's residence.

Officer C. Jacobs testified at trial that when he spoke with Ms. Zucker, she stated that she had not given the Defendant any of the checks, and that if he had them, they must have been stolen. At this time the Officer observed that Ms. Zucker was living in a state of filth. Trash, rotten food, clothing, dirty dishes, and property were strewn all over her house. The carpet was soaked with dog urine and Ms. Zucker's dog looked sickly. Ms. Zucker, who suffers from diabetes and heart problems, indicated that that she had not taken her medication, yet medications were scattered throughout her home. She told the Officer that she was hungry and had not eaten anything. When asked who was attending to her needs, Ms. Zucker stated that the Defendant was her caretaker.

On the morning of November 26, 2008, a neighbor observed a cab back into Ms. Zucker's residence and the driver load a wheelchair. Testimony revealed that the Defendant directed Sheree Silverman to pick-up Ms. Zucker and her valuables because she was going to a “doctor's appointment.” When neighbors, Vernon Drew and Leslie Aucoin, who have assisted her on and off for five years, went to check on Ms. Zucker they realized she was not home. As a result, they reported her missing. Evidence was introduced at trial that Ms. Zucker and the Defendant were married on the same date. The minister who conducted the marriage ceremony did so while Ms. Zucker sat in a car parked on a street near the courthouse.

Ms. Zucker was finally located on December 2, 2008 at the Sleep Inn in Rockville, Maryland. Hotel personnel confirmed that the Defendant and Ms. Zucker had been staying at the hotel since November 26, 2008. However, the Defendant was not at the

hotel when Montgomery County Police officers arrived. When the police got to Ms. Zucker's hotel room, she was unable to get up and open the door. The room was littered with trash, rotten and half eaten food, cups, drinks, clothing, documents, and bags of trash were thrown everywhere. Ms. Zucker's bed, where she was sitting, was stained with feces.

A letter written to Ms. Zucker from the Defendant was in plain view. The Defendant wrote that they "were tying the knot" the next day and to be ready. In addition he said, "Take all your valuables with you or you won't find them when you return! Everything. I'm taking Samantha [the dog] Tonite! Wear warm clothes, but only bring your big pocket book besides your valuables cash-diamonds Bring all medicines etc. Don't have second thoughts it will be okay..." Ms. Zucker advised police that she had received a call the night before she left to the hotel threatening her. In a later conversation with Adult Protective Services nurse, Sylvie Chen, Ms. Zucker said that the call she received the night before going to the hotel mentioned that she should bring her money, valuables, and dog to the hotel or something would happen. In addition, Ms. Zucker had almost \$19,000 in cash and her diamonds in a valise at the hotel. On December 2, 2008, Ms. Zucker refused medical treatment and chose to remain at the hotel.

On December 9, 2008, the Defendant was arrested on a parole violation warrant. Adult Protective Services responded to the hotel. In her report Sylvie Chen observed the hotel room in the same deplorable condition, littered with trash, rotten food, cups and other items. Ms. Zucker was confused, naked, wearing only a jacked, and unable to rise from the bed without assistance. In addition, Ms. Zucker had not bathed in two weeks and was hungry. Ms. Zucker was unable to tell Ms. Chen what medications she was taking, and whether she had taken her medication that day. After finally securing a place to board Ms. Zucker's dog, she agreed to be taken to Shady Grove Adventist Hospital. At trial, Dr. Gold testified that his exam revealed that Ms. Zucker had a heart attack twenty-four hours prior to her admission.

Mark Hessle, the Defendant's attorney at the time, testified at trial that he drove the Defendant and Ms. Zucker around to several banks over the course of two days after their marriage in order to put the Defendant's name on her various bank accounts, to lift restrictions, and to obtain debit cards for the Defendant. Mr. Hessle also testified that he prepared a deed to transfer title of one of Ms. Zucker's two properties to the Defendant. Ms. Zucker testified that she never signed such a deed. Mr. Hessle also testified that the Defendant told him on the day Ms. Zucker suffered from her heart attack that he believed that she was not feeling well. Mr. Hessle advised the Defendant to call for medical assistance at that time. The Defendant did not do so.

The investigation that resulted from the Defendant's arrests on October 28, 2008 and December 9, 2008, revealed that the Defendant had misappropriated or stolen approximately \$130,829.00 from Ms. Zucker and that he was engaged in a scheme to make himself the sole beneficiary under her will at the time of her death. The search warrants executed at the residence where the Defendant was residing with Ms. Zucker and at his Seven Locks address revealed dozens of copies of Ms. Zucker's will altered in the Defendant's handwriting as well as dozens of photocopies of Ms. Zucker's drivers license and of her blank checks. There was also at least one copy of her will that was literally cut into pieces and then selectively pasted onto a new will that was more favorable to the Defendant.

A final search warrant was executed on the Defendant's safe deposit box on February 26, 2009. A handgun was recovered from that deposit box forming the basis for the companion case. The Defendant was the sole owner and only person to access the safe deposit box. In addition, DNA comparison of a buccal swab of the Defendant and a buccal swab from the handgun revealed that the Defendant's profile was included as a contributor of the partial DNA profile from the gun.

## II. SENTENCING FACTORS

In determining the sentence in this case, the State asks this Court to consider the sentencing factors of punishment, deterrence, and rehabilitation and impose a forty year sentence on the Defendant given the circumstances in this case. See *Jennings v. State*, 339 Md. 675, 682 (1995); see also *Jackson v. State*, 364 Md. 192, 199 (2001); *State v. Dopkowski*, 325 Md. 671, 679 (1992); *Johnson v. State*, 274 Md. 536, 540 (1975). The sentencing guidelines are voluntary, and the ultimate authority for any sentencing lies with the judge. MD Ann. Code, Criminal Procedure § 6-211(b). The Court should impose a sentence that is above

the guidelines, based on the common reasons for departure above the guidelines that apply in this case: (10) the Defendant's major role in the offense, (11) the excessive level of harm (12), the special circumstances of the victim, (13) that the Defendant **exploited** a position of trust, (16) the vicious or heinous nature of the conduct, (17) the recommendation of State's Attorney, and (18) that other circumstances of the crime and/or the offender do not warrant a sentence within the guidelines. MSGM 14.3 ("Departure Above the Guidelines Range").

Each of these factors is discussed below as they apply to this defendant.

#### **a. Punishment**

The Defendant should be punished for his actions. The Defendant began a course of conduct, as early as 2004, to **exploit** Ms. Zucker **financially** and steal over \$130,000 from her. The Defendant engaged others to help perpetuate his crimes. Knowing that he was under investigation by the police for theft, the Defendant directed Ms. Silverman to pick-up Ms. Zucker and all of her valuables and engaged Mr. Hessel in changing the deed and overriding the restrictions on her accounts. The Defendant's major role in the neglect that aided his **exploitation** and embezzlement and argues for a sentence above the guidelines. MSGM 14.3(10).

The Defendant has failed to show any remorse for the **financial**, physical, and emotional harm he inflicted on Ms. Zucker. The Defendant stole over \$130,000 from Ms. Zucker, neglected her for months and finally left her in a dirty, uninhabitable hotel room after she had suffered a heart attack, and emotionally isolated her from her family and friends. Ms. Zucker will suffer longstanding effects from the Defendant's acts -- she will in all likelihood never be able to recover the funds stolen, she was removed from her home, her dog was euthanized, and her relationships remain distant. The excessive level and the heinous nature of the **financial**, physical, and emotional harm caused by the Defendant in this case argues for an enhanced penalty. MSGM 14.3(11), (16).

The Defendant preyed upon a vulnerable person - not only was Ms. Zucker advanced in age (she was eighty-two years of age at the start of the Defendant's crimes, a factor already considered by the guidelines), she was also wheelchair bound and unable to attend to her daily needs. Her testimony revealed that at times she was confused, and the Defendant used her limited memory to progressively steal from her. Ms. Zucker's "special circumstances," including her progressed age, lack of physical capacity, and lack of mental capacity suggest that a departure above the sentencing guidelines is appropriate. MSGM 14.3(12).

The Court should depart above the guidelines because the Defendant "**exploited** a position of trust." MSGM 14.3(13). The Defendant used his position as Ms. Zucker's caretaker to steal from her, and she trusted him fully, a factor which should be considered in his sentence.

#### **b. Specific Deterrence**

With respect to deterrence, the State believes that the recommended jail sentence will serve to specifically deter this Defendant from committing similar crimes, particularly against the **elderly**. The Defendant *began* his intimidation of Ms. Zucker from *within his jail cell* in 2004. At that time, the Defendant had started a five year sentence for Accessory After the Fact to Murder for helping to bury the body of another **elderly** woman after the Defendant's girlfriend Susan Sachs murdered and robbed her -- seventy-two year old Joyce Hadl. The Defendant called Ms. Sachs during his crimes in this case promising her one of two houses - a "beautiful house" with a "dance studio" and that he would install a "hot tub." See Transcript of Telephone Call from Roger Greenberg to Susan Sachs p36-37. The Defendant followed through with his promise to Ms. Sachs by arranging to be placed on the deed to Ms. Zucker's home and reworking her will so that he stood to receive her other home upon her death. The heinous nature of this crime, the Defendant's prior conviction for Accessory After the Fact to Murder, and his particular choice of **elderly** victims are other circumstances that "do not warrant a sentence within the guidelines." MSGM 14.3(17). The Defendant was also knowingly in possession of a deadly weapon -- a regulated handgun - despite his prior felony convictions.

As a major offender, the Defendant has also demonstrated his individual refusal, since 1967, to adhere to the laws of this country, and should be sentenced accordingly.

**c. General Deterrence**

In fashioning its sentence, the Court should also consider that a significant period of incarceration is also necessary to demonstrate to the community at large that the **exploitation** of vulnerable adults, and the **elderly** in particular, will not be tolerated.

**d. Rehabilitation**

The State believes that in the absence of remorse and/or accountability, rehabilitation should not be a weighty consideration in determining the Defendant's sentence. The Defendant is a clever manipulator who is fully competent of his actions and has no real interest in rehabilitation. In fact, the Defendant took steps *just before the trial* to continue his manipulation by contacting Ms. Zucker from jail. *See* Inmate Telephone Call of Roger Greenberg, 2/20/10, p3 (“[S]o you talked to Evelyn? Mr. Greenberg: Yeah, she said that she'll be there on Monday to testify...”). The Defendant feels no compunction against being untruthful to the Court to have his sentence reduced, and even contemplated informing the Court about a fictitious drug problem to receive less incarceration. *See* Inmate Telephone Call of Roger Greenberg, 2/20/10, p12 (“Mr. Greenberg: Are you there? I'll *tell them* that, you know, I have a drug problem... Dan [Morris of the *Washington Post*]: But you said, I mean, it sounds like you acknowledge that you have a drug problem? Mr. Greenberg: *No, of course I don't have a drug problem*”). The Defendant followed through with that claim when he reported to Mr. Gallagher, the pre-sentence Investigator, that “he has been a ‘closet opiate addict’ his entire adult life,” despite the fact that he reported no drug use in a PSI in 2005. *See* PSI p7. The Defendant also contemplated claiming to have mental illness to have his sentence reduced, or as he referred to it, a “one-time-get-out-of-jail-free-card.” *See* Inmate Telephone Call of Roger Greenberg, 2/3/10, p7 (“Esther: I don't know what, what is 8505? Mr. Greenberg: It means that it's a one-time get-out-of-jail-free-card. You can use it only one time, and I've never used it....if you have a mental history, besides drugs you know, that's even better”). The Defendant has now followed through on his intention. Dr. Rubin's reports meeting with the Defendant only on a “single, consultation” basis when the Defendant is in jail, because, as Dr. Rubin states “he seems to believe that I can sign a paper and have him released to a hospital.” PSI p7. The Defendant's willingness to manipulate the system by feigning drug and mental problems and the need for related treatment suggests that rehabilitation should play little to no role in the Court's sentencing.

**III. CONCLUSION**

The guidelines for **Financial Exploitation** of a Vulnerable Adult §8-801, Fraudulent Misappropriation of Funds by a Fiduciary §7-113, Theft Scheme Over \$500 §7-104, Neglect of a Vulnerable Adult in the Second Degree §3-605, and Illegal Possession of a Regulated Firearm § 5-133 are eight to fifteen years, with a maximum allowable penalty under the law of forty years. The State is requesting that the Court follow the State's recommendation and impose forty years of executed incarceration, to be served at the Department of Corrections. The State would further request that upon any eventual release, Defendant be forced to pay restitution as required by statute.

Respectfully submitted,

John J. McCarthy

State's Attorney for Montgomery County, Maryland

By: <<signature>>

Amanda Michalski

Jessica Hall

Assistant State's Attorney for Montgomery County, Maryland

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.